No. 15384

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE VEGA-MURRILLO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

Jurisdictional Statement.

This is an appeal from an Order of the United States District Court for the Southern District of California denying the motion of appellant to vacate a prior sentence and judgment in case No. 3313-ND. On April 5, 1955 appellant was sentenced to three consecutive terms totalling seven years for violations of Section 1324(a)(2), Title 8, United States Code.

The jurisdiction of the District Court is founded upon Section 3231, Title 18, U. S. C. The petition to vacate the original judgment was made by appellant under Section 2255, Title 28, U. S. C. The jurisdiction of the Court

of Appeals to entertain this matter may be found under the provisions of Section 1291, Title 28, U. S. C., and Rules 37 and 39 of the Federal Rules of Criminal Procedure.

II.
Statement of the Case.

Appellant was indicted by the grand jury for the Southern District of California on March 2, 1955, and was charged with three counts of violations of United States Code, Title 8, Section 1324(a)(2), illegal transportation of aliens. On March 21, 1955 appellant pleaded guilty to all three counts after consultation with his court-appointed counsel, Richard D. Love. The matter was thereupon referred to the Probation Officer for pre-sentence investigation and report, and continued until April 5, 1955 for sentence. On the latter date the court sentenced the appellant to three years on Count One, two years on Count Two, and two years on Count Three, the sentences to run consecutively. No appeal was taken from this judgment. Thereafter, on June 22, 1955, the appellant brought a motion under the provisions of Section 2255, Title 28, U. S. C., basing his motion upon the ground that while he was charged with three counts of transportation of aliens, actually the act of transportation was one, inasmuch as all three were in the same car. This motion was denied by the Court on March 10, 1956. No appeal was taken from this denial.

On May 8, 1956 the appellant filed a second petition under Section 2255, Title 28, U. S. C., and Rule 35 of

the Federal Rules of Criminal Procedure. [Clk. Tr. pp. 14-23.] The basis alleged in this petition was that appellant had been deprived of adequate representation by counsel as guaranteed by the Sixth Amendment, and had been coerced by appointed counsel, Richard D. Love, into pleading guilty. As in the previous motion, appellant also asserted that one transportation was involved although three were charged in the indictment.

On August 24, 1956 the appellant appeared before Judge Tolin on the second motion, and at that time was represented by David Marcus, counsel of his own choice. Although the Court had previously, on July 22, 1955, taken the testimony of Richard D. Love when his memory was reasonably fresh, he was again present on August 24, 1956, at which time he testified and was cross-examined by the attorney for appellant. Appellant testified at this hearing on his own behalf and was cross-examined by the Government. Following the hearing, findings of fact and conclusions of law were prepared and submitted, and were signed by the court on September 19, 1956. The court found, among other things, that the petitioner (appellant) was not a credible witness and not worthy of belief; that Richard D. Love was a credible witness worthy of belief; that petitioner was advised, prior to his entry of plea in the case, by his attorney as to the nature of the charge against him, his right of trial by jury, his right to use the power of the court to summon witnesses in his own behalf, his possible defenses, the maximum sentence provided by law, the consequences of

a plea of guilty, and the sentence which the court could impose upon such a plea. The court also found that the petitioner knew and understood the sentence which the court could impose upon his plea and the nature of the proceedings and charges against him. It further found that the petitioner entered his plea of guilty to each of the counts freely, voluntarily, and with full knowledge, understanding and appreciation of the sentence which the court might impose. The court concluded that petitioner was fully and properly represented by counsel in case No. 3313-ND, and that his constitutional right to representation by counsel was not denied him. The motion to vacate the prior sentence and judgment was therefore denied by Judge Tolin on September 19, 1956. Appeal has been taken from the denial of said motion.

III.
ARGUMENT.

A. The Defendant Was Not Denied Due Process of Law nor the Equal Protection of the Laws, Inasmuch as He Was Not Deprived of Adequate Representation of Counsel Within the Purview of the Sixth Amendment.

Appellant's first specification of error alleges that he was denied the effective representation of counsel. Appellant was represented in the court below by Richard D. Love, of the Fresno, California, Bar. Mr. Love was Chairman of the Bar's Indigent Committee, and was appointed by Chief Judge Yankwich to represent the appellant at his arraignment proceedings on March 21, 1955. This was true, although the defendant had stated that he wished to proceed without an attorney. [Ex. A, p. 2.] After the appointment was made, the court permitted appellant and his attorney to consult on the matter before proceeding with the plea. The defendant was handed a copy of the Indictment. [Ex. A, p. 2.] On September 19, 1956 the court found "that Richard D. Love is a qualified attorney admitted to the practice of law in the federal court of the Southern District of California;" that he was a credible witness, a qualified attorney duly admitted to the practice of law before the federal court of the Southern District of California on March 21, 1955; that Richard D. Love was appointed by this court sitting in Fresno County, California, on March 21, 1955, to represent George Vega-Murrillo in the case of *United States v. George Vega-Murrillo,* No. 3313-ND; that petitioner was advised, prior to his entry of plea in case

No. 3313-ND, by Richard D. Love, as to the nature of the charge against him, his right of trial by jury, his right to use the power of the court to summon witnesses in his own behalf, his possible defenses, the maximum sentence provided by law, the consequences of a plea of guilty, and the sentence which the court could impose upon such a plea. The court also found appellant was not a credible witness, and not worthy of belief. [Clk. Tr. pp. 24-27.]

The appellant has not specified as error any of these findings of fact. The United States Circuit Court of Appeals for the Ninth Circuit, in Rule 18(2)(d) provides:

> "In all cases when findings are specified as error, the specifications shall state as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous."

No objection having been taken, appellant is bound by the findings of fact. *Lipscomb v. United States* (1954, 8th Cir.), 209 Fed. 831, 834-835. Despite this situation, appellant devotes almost his entire brief to a rambling dissertation setting forth testimony of the attorney and of the appellant, and his counsel's argument concerning the alleged denial of an effective right to counsel. (App. Br., pp. 7-44.) The effect is to argue the credibility of witnesses. In this portion of the appellant's brief counsel severely criticizes a fellow member of the Bar for alleged inept handling of the case. His contentions in this regard are based primarily on appellant's testimony, which the court found not to be worthy of belief; and upon counsel's arguments, which were not adopted by the court in its ultimate findings, conclusions and order.

The testimony of Mr. Love, which was found by the court to be credible, was that he did not recommend a guilty plea and that it was not his habit to do so. [Rep. Tr. pp. 15, 48.] He stated in effect he explored the facts fully. [Rep. Tr. pp. 59, 75.] He was satisfied appellant understood the charge. [Rep. Tr. pp. 45, 47.] He also advised appellant of the possible maximum penalty of five years on each count, which might run consecutively. [Rep. Tr. p. 52.] Thereupon appellant decided to plead guilty. [Rep. Tr. p. 52.] It is frequently asserted, after a proceeding has been completed, that the aggrieved party did not receive proper representation of counsel. In that regard this court has said:

> "The position is taken by appellant that he was inadequately represented by counsel appointed by the court. However, it has been many times held that hindsight is not the proper measure for determining this question, and it has as often been held that the Constitution does not guarantee that counsel appointed for, or employed by, a defendant shall measure up to his notions of ability or competency. It is said in *Loisieau v. United States,* 177 F. 2d 919, that it is enough that the trial court appointed a qualified attorney to represent petitioner and that the attorney appeared, advised with, and represented him." *Sherman v. United States* (9 Cir., No. 14977, January 22, 1957), ... F. 2d ....., at page 11 of slipsheet opinion.

A leading commentary on contentions that counsel did not afford a defendant the degree of protection which is guaranteed him under the Sixth Amendment is contained in *Latimer v. Cranor* (1954, 9 Cir.), 214 F. 2d 926, where Chief Judge Denman stated at page 929:

> "The application alleges that Latimer's attorney mishandled his case

> "This is a frequent contention of unsuccessful defendants. There are no allegations showing the attorney's conduct was so incompetent that it made the case a farce requiring the court to intervene in his client's behalf. We find no denial of the efficient representation of the Constitution."

Other cases to the same effect are: *Losieau v. United States* (1949, 8 Cir.), 177 F. 2d 919; *Conley v. Cox* (8 Cir.), 138 F. 2d 786, 787; *United States ex rel Feeley v. Ragen* (1948, 7 Cir.), 166 F. 2d 976; *Moss v. Hunter* (1948, 10 Cir.), 167 F. 2d 683; *United States v. Wight* (1949, 2 Cir.), 176 F. 2d 376, 379; *Shepperd v. Hunter* (1947, 10 Cir.), 163 F. 2d 872, 873; *Williams v. United States* (1954, 4 Cir.), 218 F. 2d 276, 279-280; *Hayman v. United States* (1953, 9 Cir.), 205 F. 2d 891, 894.

The hearing on August 24, 1956 was an adversary proceeding before the court. Both sides were represented by counsel. Both sides had an opportunity to offer evidence and to cross-examine the witnesses. The trial court thereupon made findings regarding the credibility of the witnesses involved and came to a final conclusion. There was a definite conflict between the testimony of the attorney Love and appellant Vega-Murrillo. The court did not believe appellant. Under these circumstances the appellate court should not lightly disturb the trial court's result. Rule 52(a) Federal Rules of Civil Procedure; *Hanock v. Eck,* 183 F. 2d 632; *Oedecker v. Muncie Gear Works, Inc.,* 179 F. 2d 821, 824. The trial court has had the opportunity to observe the demeanor of the witnesses and to determine which to believe. The appellate court does not have that advantage.

However, an examination of the record is revealing as to the credibility of appellant. In paragraph VIII of

the motion filed May 8, 1956 the appellant states: "That at no time was the defendant served with a copy of the indictment." [Clk. Tr. p. 16.]

The record of the court shows that the Clerk handed a copy of the Indictment to appellant on March 21, 1955 at the time of his arraignment. [Ex. A, p. 2, line 9.]

In his earlier petition filed June 22, 1955 appellant makes the following representation:

> "The petitioner was not advised by counsel that each person was to be a count against him, or that he would be sentenced on each count, and therefore entered the plea of guilty, waiving all burden of proof to be established by the United States Attorney, and therefore contends that he did not receive the best efforts of his counsel and is entitled to a redress of this sentence." [Clk. Tr. p. 7, lines 11-17.]

Despite this allegation, appellant under oath testified on August 24, 1956 that the attorney said to him, "You know you can get 15 years." (App. Br., p. 19, lines 5-6.) This shows that appellant was advised of the maximum sentence of fifteen years which could be imposed by three consecutive sentences under Title 8, Section 1324(a)(2), United States Code. The maximum under each count is five years.

Thus, in his own record appellant shows that he is not one worthy of belief, and that he is a person who is likely to say whatever may seem desirable to achieve the end which he seeks at the time.

He took advantage of the court by claiming the right to representation by a member of the *indigent* defense panel. Nonetheless, his own testimony on August 24, 1956 was that after sentence he sent an offer to his attorney,

Love, of $100.00 to assist him further in the matter, and did obtain $50.00 to this end. [Rep. Tr. p. 111.] He was, therefore, not entitled to the free legal assistance which he now attacks.

In addition to all the foregoing, the court had before it at the hearing the files of two previous criminal actions showing felony convictions involving illegal smuggling of aliens by appellant. [Rep. Tr. p. 142.] The previous record was admitted by appellant while on the stand. [Rep. Tr. pp. 131, 140.] Appellant's probation was revoked in one instance. [Rep. Tr. p. 136.] These factors could be considered by the court in assessing appellant's credibility as a witness at the hearing.

It is the position of the appellee that the record clearly shows on its face that appellant did have proper representation of counsel. The entire record shows it. The findings of the court to this effect have not been attacked. Those findings of fact should be binding on this appeal where the evidence, as here, supports them.

B. Congress Has the Power to Regulate the Transportation of Aliens Within the Respective States.

Appellant's second point is based on a claim that here is an intrastate transportation of aliens illegally in the country, and that by virtue of the intrastate phase, Congress has no power to regulate such transportation. Such a conclusion is manifestly unjustified. For example, there is a long line of authority dealing with the federal regulation of railroad tariffs and rates, including intrastate regulations necessary to the proper exercise of interstate powers of regulation. See, for instance: *Wabash, St. Louis & Pacific Railway Co. v. Illinois* (1886), 118 U. S. 557; *Morgan v. Commonwealth of Virginia* (1946), 328 U. S. 373; *Leisy v. Hardin* (1890), 135 U. S. 100; *The*

Shreveport cases, 234 U. S. 342; *Railroad Commission of Wisconsin, et al. v. Chicago, Burlington & Quincy RR.* (1922), 257 U. S. 563; and *In re Rahrer* (1891), 140 U. S. 545. The proposition established in all of these cases is, to quote *In re Rahrer,* at 555: "The power of Congress to regulate commerce among the several States, when the subjects of that power are national in their nature, is also exclusive." Inasmuch as Article I, Section 8, of the Constitution of the United States gives to the Congress power to regulate interstate and foreign commerce, and further, to provide a uniform rule of naturalization, it certainly follows that the traffic in aliens within the boundaries of the United States is one requiring a uniform system of regulation, and, as such, is obviously within the purview of the powers of Congress, even though the specific act complained of is an entirely intrastate transportation of an alien illegally in this country.

To say that Congress is without power to control trafficking in illegal aliens for the fortuitous happenstance that the particular traffic occurred entirely within one state is to ascribe an impotence to the Government of the United States which reason can neither countenance nor commonsense subscribe.

In this regard compare the White Slave Traffic cases where the victim gets out of the automobile transporting her and walks across the State border, and then resumes her journey in the automobile after the vehicle has crossed the State line. *Mellor v. United States* (1947), 160 Fed. 757, c. d. 331 U. S. 848, 67 S. Ct. 1734, 91 L. Ed. 1858. It is all a part of the proscribed interstate traffic for immoral purpose, although the accused did not actually transport the victim across the line.

As a part of this specification of error appellant contends that Section 1324(a)(2) of Title 8, United States Code, is contrary to and contravenes Article IV, Section 2, of the Constitution of the United States (the privileges and immunities of citizens of each state); and that it is contrary to and contravenes the Ninth and Tenth Amendments of the Constitution, to-wit: Article IX, the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people. Article X, the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. The foregoing points, while set out in appellant's brief, are not argued or supported by citation. The contentions are manifestly unsound. The failure to argue them is, in effect, a waiver. *Kimball Laundry Co. v. United States* (1948, 8 Cir.), 166 F. 2d 856, 859, where it is stated:

> "An unargued assertion of error is no more helpful to an appellate court than is an unsupported allegation of fact to a trial court. The burden of demonstrating error is upon an appellant, and errors assigned, but not argued in his brief, are waived." (Citing cases.)

C. The Court Was Correct in Sentencing the Defendant Consecutively on the Three Counts of the Indictment.

Appellant's third point on appeal is to the effect that there having been a single transportation of the three aliens, only one sentence could be imposed under Section 1324(a)(2), Title 8, United States Code. No appeal was taken from the sentence. Furthermore, it was a point which was raised in defendant's motion dated June 22, 1955, and denied by the order of the court on March

30, 1956. [Clk. Tr. p. 13.] No appeal was taken from the denial of this motion.

However, treating the matter on the merits, it is clear that the appellant's contention is based primarily on the case of *Bell v. United States,* 349 U. S. 81, which is a Mann Act case. In that situation, after the trial court and the Circuit Court had upheld a sentence imposing consecutive penalties for a single transportation involving two women, the Supreme Court said at pages 82-83:

> "The punishment appropriate for the diverse federal offenses is a matter for the discussion of Congress, subject only to constitutional limitations, more particularly the Eighth Amendment. *Congress could no doubt make the simultaneous transportation of more than one woman in violation of the Mann Act liable to cumulative punishment for each woman so transported.* The question is: Did it do so? It has not done so in words in the provisions defining the crime and fixing its punishment. Nor is guiding light afforded by the statute in its entirety or by any controlling gloss. The constitutional basis of the statute is the withdrawal of 'the facility of interstate transportation.' . . ." (Emphasis supplied.)

It is apparent that the Supreme Court bases its decision in the foregoing case upon the statutory construction and, in effect, finds that the Mann Act, 18 U. S. C., Section 2421, makes the act of transportation determinative, rather than the number of persons transported. This is not true of the Act for which the appellant is charged. A comparison of the statute reveals that the Mann Act states:

> "Whoever knowingly transports in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States,

any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice, . . . shall be fined not more than $5,000.00 or imprisoned not more than five years, or both."

The Act under which the appellant is charged, Section 1324(a)(2), Title 8, United States Code, provides:

"(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who— . . .

"(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law; . . .

"any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000.00 or by imprisonment for a term not exceeding five years, or both, *for each alien in respect to whom any violation of this subsection occurs.* . . ." (Emphasis supplied.)

From a comparison of these two sections, it is obvious that Section 1324, Title 8, U. S. C., is distinguishable

from the provision of the White Slave Traffic Act, in that the punishment is provided for *each* alien in respect to whom any violation of the subsection occurs. Such is not true under the Mann Act. Accordingly, the contention of appellant with regard to the applicability of the *Bell* case is without merit.

Under this ground of appeal, appellant makes the point that the prosecutor can only cull one offense out of a single criminal act. In this connection, the language of *Sherman v. United States* (9 Cir., No. 14977, Jan. 22. 1957), ... F. 2d ....., at page 8 of the slipsheet opinion, says:

> "It is true that each of the three offenses were part of a general plan but each had a separate genesis and separate train of events leading to culmination. Without further comment on the cases cited by appellant in support of his single transaction theory, we point out that the law is well established, that even if there be any substance to the single transaction rule, it does not apply in the federal courts."

The court in *Reynolds v. United States,* 280 Fed. 1, commented on the so-called "single transaction" rule as follows:

> "The sole contention of plaintiff in error here (although stated in two forms) is that she has been twice punished for a single offense, invoking in support of that contention, divers holdings of state courts under what is called the 'same transaction' rule. This broad rule does not prevail in the courts of the United States, wherein it is well settled that it is competent for Congress to create separate and

distinct offenses growing out of the same transaction.'"

See *Gavieres v. United States,* 220 U. S. 338;

Pereira v. United States, 347 U. S. 1;

Matthews v. Swope (9 Cir., 1940), 111 F. 2d 697.

Congress has seen fit to legislate a punishment for each alien in respect to whom any violation of Subsection 1324(a) occurs. The contention of appellant must therefore be rejected.

IV.
Conclusion.

1. The finding of the trial court that the appellant had the effective representation of counsel should not be disturbed. The credibility of the witnesses was determined in favor of the Government. The defendant has failed to show that he was denied due process.

2. Section 1324(a)(2), Title 8, United States Code, is a constitutional regulation of the transportation of aliens illegally within the United States. Incident to Congress' right to regulate commerce and to provide a uniform rule of naturalization, regulation of the movements of aliens illegally within the United States, or any part thereof, is properly the subject of congressional legislation.

3. The court properly sentenced the defendant to consecutive sentences for the transportation of each alien, in accordance with the specific provisions of Section 1324(a) of Title 8, United States Code.

Wherefore the Government respectfully requests that the order and judgment of the trial court denying defendant's motion under Section 2255, Title 28, United States Code, be affirmed.

Respectfully submitted,

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